

2012 WL 6101804 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

Ricky Z. BYRD and Vera Virginia X. Byrd, Appellants,
v.
CYNTHIA ANNETTE BYRD AND SUSIE BYRD, Appellees.

No. 2011-CA-00596.
February 27, 2012.

(Oral Argument not Requested)
On Appeal from the Chancery Court of Jackson County, Mississippi
Cause No. 2008-0108NH

Brief of Appellees

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***iii TABLE OF CONTENTS**

| | |
|---|-----|
| Certificate of Interested Persons. | i |
| Table of Contents. | iii |
| Table of Authorities. | iv |
| Statement of Facts | 1 |
| Summary of the Argument | 6 |
| Argument | 7 |
| Conclusion | 16 |
| Certificate of Service | 18 |

***iv TABLE OF AUTHORITIES**

| | |
|---|----|
| CASES | |
| McNeil v. Hester 753 So.2d 1057 (Miss. 2000) | 10 |
| Lane v. Lane 850 So.2d 122 (Miss. App. 2002) | 13 |
| Smith v. Dorsey 599 So.2d 529 (Miss. 1992) | 15 |
| Mississippi State Highway Commission v. Spencer 101 So.2d 499 | 16 |
| OTHER AUTHORITIES | |
| Section 11-55-5 Mississippi Code Annotated | 15 |

***1 APPELLEES' STATEMENT OF FACTS**

Appellees believe it would be helpful to the Court to file their own Statement of Facts. The Appellants are Ricky Z. Byrd (hereinafter “Ricky”) and Vera Virginia X. Byrd (hereinafter “Virginia”). The Appellees are Cynthia Annette Byrd (hereinafter “Cynthia”) and Susie Byrd (hereinafter “Susie”). Ricky, Virginia and Cynthia are siblings and Susie is their mother. Cynthia's married name was “Abney”, but she was divorced and her maiden name, of “Byrd” was restored.

Appellees further believe that it would be helpful to the Court to file Appellees' Record Excerpts which will include documents not included in Appellants' Record Excerpts. This source will be cited hereinbelow as Appellees' R.E. Appellants' Record Excerpts will be cited as Appellants' R.E.

This action was commenced on January 16, 2008, when Ricky filed a lawsuit against *2 Cynthia. The case languished until on or about December 23, 2009, when an Amended Complaint was filed naming Ricky and Virginia as Plaintiffs and Cynthia as Defendant. (Clerk's Papers, 1-8).

Subsequently, Cynthia filed an Answer and a Counterclaim against Ricky and Virginia. Susie joined with Cynthia in the Counterclaim. (C.P. 10-24)

This action involves a series of events commencing in approximately July, 1990, regarding the purchase of certain residential real estate described as Lot 35 Lakeland View Subdivision, Jackson County, Mississippi, and with municipal street address 3103 Baltimore Avenue, Pascagoula, MS 39567, (The "subject property"). Several of the parties resided in this house at different times.

According to the documents introduced into evidence at trial, the sale closed on July 27, 1990 and the purchasers were Vera Virginia Byrd and Kathy Denise Byrd. The Purchasers paid \$6,500.00 cash at closing and assumed a Deed of **Trust** with a maturity date of October 1, 2001. (Appellees' R.E., 1-5, 7-8)

This Deed of **Trust** was satisfied by an Authority to Cancel dated April 18, 2001 and recorded in the land records of Jackson County on April 30, 2001. (Appellees' R.E., 6)

On January 3, 2002, Kathy Denise Byrd executed a Quitclaim Deed conveying her interest in the subject property to Vera Virginia Byrd. (Appellees' R.E., 9). There was no consideration paid by the Grantee in this transaction.

On March 8, 2002, Vera Virginia Byrd executed a Quitclaim Deed conveying her *3 interest in the subject property to Ricky Z. Byrd. (Appellees' R. E., 10). There was no consideration paid by the Grantee in this transaction.

On December 16, 2002, Ricky Z. Byrd executed a Warranty Deed conveying the subject property to Cynthia Byrd Abney. (Appellees' R. E., 11). There was no consideration paid by the Grantee in this transaction.

Ricky and Virginia filed their Amended Complaint on December 23, 2009, alleging that the subject property rightfully belonged to Virginia; that no consideration was paid by either Ricky or Cynthia when the subject property was conveyed to them; that a constructive **trust** was created by these conveyances for the benefit of Virginia; that Cynthia was in a fiduciary relationship with Virginia and by failing to re-convey the subject property to Virginia, that Cynthia had breached her fiduciary duty to Virginia, and that the Court should set aside the conveyances to Ricky and Cynthia and should order Cynthia to convey the subject property to Virginia and to require Cynthia to pay Virginia's attorneys fees and costs. (C.P., 1-7).

Cynthia answered the Amended Complaint admitting that no consideration was paid for the transfers from Virginia to Ricky and then Ricky to Cynthia, and admitting that she had agreed to re-convey the subject property to Virginia, but only upon certain conditions, primarily that Virginia reimburse her for funds expended for certain taxes and insurance premiums paid by Cynthia for the benefit of the subject property.

Accordingly, Cynthia included in her Answer a Counterclaim in which she requested *4 that the Court award her a judgment for the sums paid by her for the benefit and preservation of the subject property and impress a lien upon the subject property for those sums. Cynthia alleged that the lawsuit filed by Ricky and Virginia was false and filed out of malice and requested punitive damages, attorneys fees and costs. (C.P., 10-24).

Susie joined in the Counterclaim alleging that the subject property was originally purchased to provide her with a home, but, due to her receiving Social Security disability at that time, she believed that she could not have record title vested in her name. Susie alleged that she agreed to pay one-half of the mortgage payments and that from September, 1990 through September, 2000 that she contributed \$25,910.00 to Virginia for payments toward the mortgage.

Accordingly, Susie requested the Court to impress a lien upon the subject property for the sums she contributed to the mortgage. Further, that the Court order that the subject property be sold and the proceeds used to pay her lien. (C.P., 10-24).

The case came on for trial on December 14, 2010. The trial was not completed and on March 3, 2011, the parties and their respective counsel returned to court and the trial was concluded on that date.

After all the parties rested, the Chancellor heard closing arguments from the parties' respective counsel and issued a ruling from the bench. (Transcript, 152-155).

The Chancellor ruled that Susie by virtue of a constructive **trust** would be awarded a one-half interest in the subject property. He also ruled that Cynthia, who held record title ***5** at the time of trial, was entitled to a one-half interest in the subject property. The Chancellor allowed Ricky and Virginia 60 days to acquire Cynthia one-half interest in the subject property by paying to Cynthia the sum of \$1,100.41 for the expenses she incurred and the sum of \$8,240.20 for the attorneys fees and expenses she incurred in this litigation.

Further, the Chancellor awarded a \$3,500.00 insurance refund payment (resulting from a retainage withheld from a prior property damage claim paid by the insurance carrier) to Cynthia to be applied toward the amount awarded to her for expenses and attorneys fees incurred by her.

The Final Judgment was entered on March 15, 2011, and from this Judgment, Ricky and Virginia have appealed.

***6 SUMMARY OF THE ARGUMENT**

This case involves a complicated set of facts and, not surprisingly, a different interpretation of these facts by the opposing parties. There are also several equitable principles which have application here including unclean hands, constructive **trusts** and the latitude of a Chancellor to devise an equitable remedy in his decree.

Appellees will address these issues by responding in order to the four (4) propositions set forth in Appellants' Brief.

Appellees would submit that the decision rendered by the Chancellor, while not in keeping with the specific relief requested by the parties, is a fair and equitable resolution of this dispute.

***7 ARGUMENT**

Appellants' Proposition 1: Whether the decision of the Jackson County Chancery Court was against the overwhelming weight of the evidence in awarding Susie Byrd an undivided one-half interest in the subject property via a constructive **trust** was in error.

This controversy began in 1990 after Susie had gone through a bad divorce and she was trying to move out of the marital home because of the harassment of her former spouse. All of the parties agree on this fact. (Transcript 9, 81-82, 117)

It was decided that several of the adult children and Susie would join together to help find a house for Susie, who at that time was receiving Social Security disability benefits. Several of her younger children were still living with her. (T. 10-11)

After some family discussions, it was determined that a house located at 3103 Baltimore Avenue in Pascagoula would be purchased and Susie and her younger children would move in. (T. 10-11)

Virginia's recollection is that she was purchasing the house for herself. She lived in Beaumont, Texas, at the time and was employed as a chemical engineer for Mobil.

Virginia testified that her mother Susie was paying her \$00.00 per month after the property was purchased. Virginia claimed this was for rent and not for mortgage payments as Susie maintained. (T. 63-65, 118)

Cynthia testified that Susie's name was not put on the deed when the property was *8 purchased because Susie was under the impression that if she owned property it would adversely effect her disability income. (T. 84-85) Cynthia also testified that the monthly payments made by Susie to Virginia for ten (10) years were for mortgage payments. (T. 86)

A review of some of the trial exhibits will help in determining which version of the facts is more credible. (These exhibits are found in Appellees' Record Excerpts.)

Exhibit 1 is the closing statement for the purchase of 3103 Baltimore Avenue which occurred on July 27, 1990. (Appellees' R.E. 1) It shows that the monthly mortgage payment was \$430.25 and that the purchasers would assume responsibility for this payment beginning on September 1, 1990.

According to the original Deed of **Trust** (Appellees' R.E. 2-5) the monthly principal and interest payment was \$388.97. So the escrow for taxes and insurance at that time would have been \$41.28 per month. The maturity date of this mortgage was October 1, 2001.

The Authority To Cancel was dated April 18, 2001 and recorded on April 30, 2001. (Appellees' R.E. 6) This means that the mortgage was paid in full sometime prior to April 18, 2001.

Susie produced copies of money orders dated from September 6, 1990 through September 1, 2000. These money orders were payable to Vera Byrd ("Virginia" herein) and totaled \$25,910.00. A summary was introduced into evidence. (Appellees' R.E. 12)

Susie maintained that these payments represented one-half of the mortgage payments. Virginia maintained these payments were for rent.

*9 If one were to divide the total payment of \$25,910.00 by 10 years or 120 months, the result would be \$215.91. The monthly mortgage payment at the time of purchase, including escrow, was \$430.25.

So it appears from the documents that Susie was, in fact, paying one-half of the mortgage payment for ten (10) years. The mortgage was paid in full sometime before April 18, 2001, but we don't know that date.

Susie continued to reside in the house until 2006, but stopped making payments to Virginia in September, 2000. Within a few months after September, 2000, the mortgage was paid in full and satisfied.

If the payments made by Susie to Virginia were for rent, then the rent would continue to be due after the mortgage was paid. Yet Susie made no payments to Virginia after September, 2000.

Obviously, the documentary evidence lends credibility to the contentions of Susie and Cynthia that Susie's payments were mortgage payments and not rent.

The Chancellor ruled that these were mortgage payments and that Susie was entitled to a one-half interest in the subject property by virtue of the establishment of a constructive **trust**. (T. 152-153)

It is not necessary here to restate the definition of a constructive as Appellees agree with the definition and case citations set forth in Appellants' Brief.

It is not necessary for Susie to prove fraud, duress, artifice or concealment to *10 establish the creation of a constructive **trust**. Susie need only prove that Virginia was unjustly enriched by holding title to the subject property when, under principles of justice and fairness, Susie was entitled to a one-half interest therein. See [McNeil v. Hester 753 So.2d 1057 \(Miss. 2000\)](#). Susie met her burden of proof.

Appellees argue that Susie testified she did not want any interest in the subject property. On direct examination Susie did testify that she and Virginia bought the house together and that she would like to have back the money she paid for mortgage payments. (T. 118,121) Susie also testified in response to the Court's questions: "I feel like what I put in the house that I should get something out of the house." (T. 122).

Susie also testified that she did not want any money "if they don't want to give it to me." (T. 121.) and "if she feel like she don't want to give me nothing, well, she don't have to give me nothing," (T. 125) apparently referring to Virginia.

Susie is a very **elderly** disabled lady in a wheelchair and she was very emotional during her testimony. She was closely observed by the chancellor who also asked her questions, specifically, asking her if she felt that she owned half of the house. (T. 122). That question elicited Susie's response referred to above in which she stated she felt she should get something out of the house.

In response to the argument of Virginia's counsel that Susie stated on the record that she did not wish to pursue repayment of the money she paid to Virginia, the Chancellor replied:

*11 "What she said was 'if they don't want to give me nothing,' I thought 'they' meant the Court" (T. 130-131)

Accordingly, there is substantial evidence in the record to refute Appellees' claim that Susie did not seek the relief granted by the Chancellor. Further there is substantial evidence to support the imposition of a constructive **trust** in Susie favor.

Appellees' Proposition 2: Whether the decision of the Jackson County Chancery Court in denying Vera Virginia X. Byrd a constructive **trust** in the subject property, but requiring Cynthia Annette Byrd to sell her undivided one-half(2) interest in such property to Vera Virginia X. Byrd for 1,100.41 plus 8,240.20 in attorneys fees was in error.

At Page 8 of their Brief, Ricky and Virginia state that Cynthia and Susie admitted in their counterclaim that Virginia "was entitled to a constructive **trust** in the subject property and good title to such property," citing as the source of this allegation the Answer and Counterclaim.

This statement is simply untrue. There is no such admission or statement in that pleading. In fact, the term "constructive **trust**" cannot be found in the Answer and Counterclaim. (C.P. 10-20)

What Cynthia did plead and testify to is that she had always agreed to convey the subject property to Virginia on the condition that Cynthia and Susie be reimbursed for their expenditures for the taxes, insurance and mortgage payments made by them. (T. 88-89; 96-98; 102-103, 109; 114)

At Page 9 of their Brief, Ricky and Virginia state:

*12 "Clearly Cynthia Byrd got title to the subject property by fraud and other questionable means"

And

"Certainly Cynthia got title by fraud and abuse of confidence of Ricky and Vera Byrd."

There is no testimony or documentary evidence whatsoever in this record to support either of these statements.

All of the parties agree that *Cynthia was approached by Ricky* and he requested that Cynthia accept a deed from Ricky conveying the subject property to Cynthia. (T. 40, 88). Even Ricky and Virginia's Amended Complaint states that Ricky approached Virginia and recommended that she transfer the subject property to Cynthia. (C.P.2 in Paragraph VII)

Next, Ricky and Virginia admit that Cynthia paid the insurance premiums for the subject property and that she may be entitled to a lien for these amounts. However, this admission is for only the premiums paid for the years 2003 through 2006, when the policy was a homeowner's policy.

They deny that Cynthia should be reimbursed for the insurance premiums she paid for 2007 through 2009 because the policy was converted to a renter's dwelling policy.

The coverage was the same and the property itself equally benefitted from both types of coverage. Cynthia explained that she was not living in the property and it could not qualify for homeowners. She further explained there would be less difficulty in the event of a claim as she and Virginia were not communicating and were involved in litigation *13 against each other. (T. 94-95)

Clearly, Cynthia is entitled to be reimbursed for all insurance premiums paid for the subject property.

At Page 10 of their Brief, Ricky and Virginia state that the unclean hands doctrine was not pled. This also is not accurate. In Paragraph XV of the Answer and Counterclaim, Cynthia alleges that Virginia's conduct "amounts to acting with unclean hands and her Complaint should be dismissed." (C.P. 13-14)

Even if Cynthia had not pled the unclean hands doctrine, the Chancellor may apply the doctrine sua sponte where it is shown to be applicable. [Lane v. Lane](#), 850 So.2d 122 (Miss. App. 2002).

Virginia testified that the reason that she transferred title in the subject property to Ricky was to avoid the potential claims of creditors. (T. 46). This action certainly would qualify as unclean hands.

It is true that there is a dispute in the facts of this case, but there is substantial evidence in the record to support the Chancellor's ruling.

Virginia, at Page 11 of Appellees' Brief, states that she was denied funds to repair the house from damage from Katrina. This statement is not true. The proceeds from the homeowner's insurance were paid to Virginia, Cynthia and Kathy Byrd, to repair the damage to the house from Katrina. Cynthia endorsed the check and turned it over to Virginia and she had the home repairs done. (T. 92,105)

*14 There was a part of the insurance proceeds retained by the insurance company pending the completion of the repairs. After the repairs were completed the retained sum of 3,500.07 was paid over to the insureds. A check was issued payable to Virginia, Cynthia and Kathy Byrd and because the parties were not communicating and at odds, they could not agree on who would receive these funds (T. 92-93)

This brings us to Appellees' Proposition 3: Whether the decisions of the Jackson County Chancery Court to award the insurance check for the subject property in the amount of 3,500.07 to Cynthia Byrd was in error.

As discussed above these insurance proceeds were retained funds paid over to the named insureds by the carrier after the house damage was repaired. The Chancellor did not make a determination as to which of the payees were entitled to these funds. (Kathy Byrd made no claim for these funds.) He simply ordered that these funds be paid to Cynthia and applied to the amounts that he ordered Virginia and Ricky to pay to Cynthia.

So the actual effect is that Virginia is getting credit for the insurance funds as an offset from the Judgment against her and in favor of Cynthia.

Proposition 4: Whether the award of attorney's fees to Cynthia Annette Byrd in the amount of \$,240.20 was in error?

Cynthia agrees with the Appellees' assertion that attorneys fees can only be awarded through operation of law or by contract. Exceptions are recognized where the conduct of the offending party is frivolous or is so outrageous as to support an award of punitive *15 damages. *Smith v. Dorsey* 599 So.2d 529 (Miss. 1992) and [Section 11-55-5 of the Mississippi Code Annotated](#).

This litigation originated when Ricky filed a Complaint against Cynthia on January 16, 2008 alleging that he was entitled to title to the subject property. (Appellees' R.E. 19-21)

Cynthia retained counsel to defend her in this action. She paid her counsel \$2,500.00 in that defense and her statement was introduced into evidence without objection as Exhibit 10. (Appellees' R.E. 22-29) (T. 98-99)

Appellees would submit that there is no way that Ricky could prevail in this original complaint as he had absolutely no legal or equitable claim to the subject property, thereby bringing it squarely within the provision of [MCA 11-55-5](#). Further, Ricky allowed this lawsuit to languish until the Amended Complaint was filed on December 23, 2009, almost two years later.

There was ample proof presented to allow the Chancellor in his discretion to award Cynthia these attorneys fees of \$2,500.00.

The Chancellor found that Virginia had acted with unclean hands when she conveyed the subject property to Ricky to avoid the potential claims of creditors. (T. 155)

There was substantial evidence presented to show that Virginia and Ricky made false and fraudulent allegations against Cynthia and that this litigation was brought against Cynthia out of ill will, malice, and reckless disregard for her rights, thereby justifying an *16 award of punitive damages.

The evidence clearly showed that Cynthia was acting in good faith all along, including continuing to pay hazard insurance premiums on the subject property for two years after she was being sued by her siblings. As Cynthia testified, she could have mortgaged or sold the property anytime after she acquired title in December, 2002, if her motives were bad. (T. 96)

Again there was substantial evidence in the record for the Chancellor in his discretion to award attorneys fees to Cynthia.

CONCLUSION

The Chancellor did not grant the specific relief requested by Cynthia and Susie in this case. They prayed for the imposition of a lien against the subject property for the payments they contributed for mortgage payments, taxes and insurance. Further, they requested that the property be sold and from the proceeds that their lien be paid.

As stated in *Mississippi State Highway Commission v. Spencer*, 101 So.2d 499, at Page 505:

“A court of equity, in granting relief to Plaintiff may, in its discretion, impose any conditions thereon that may seem just and proper under the circumstances, even though there is no demand therefore...” And

*17 “A court of equity has power to make its granting of relief dependent upon the performance of conditions by a party litigant, if the conditions are such as are imposed in the exercise of a sound discretion and of a character calculated to satisfy the dictates of conscience.”

The Chancellor heard the evidence and found that Susie's payments of \$25,910.00 to Virginia were mortgage payments and that Susie was entitled to a one-half interest in the property. He also found that Cynthia was entitled to reimbursement of the \$11,100.41 she paid for taxes and insurance premiums, He also awarded Cynthia attorneys fees in the sum of \$8,240.20, which she incurred as a result of this litigation.

The Chancellor fashioned his own remedy which he had discretion to do. His remedy allows Virginia (and Ricky) the opportunity to acquire a one-half interest in the subject property by paying to Cynthia the expenses and attorneys fees she incurred.

This ruling allows Cynthia to be made whole and allows Virginia the opportunity to retain the half interest which by implication she acquired at the time of the original purchase.

Appellees would submit that there is substantial, credible evidence in the record to support the Chancellor's ruling and it should be affirmed.

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